UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

APOGEE RETAIL LLC D/B/A
UNIQUE THRIFT STORE

and

KATHY JOHNSON, AN INDIVIDUAL

Cases 27-CA-191574
27-CA-198058

GENERAL COUNSEL'S BRIEF TO THE BOARD

I. Introduction and Statement of the Issue

Retailer Apogee Retail LLC d/b/a Unique Thrift Store (Respondent) maintains written handbook rules requiring employees of its retail stores to keep confidential workplace investigations into illegal or unethical behavior on the job. Believing that confidentiality requirement to be a violation of Section 8(a)(1) of the Act under *Banner Estrella Medical Center*, 362 NLRB No. 137 (June 25, 2015), the Director for Region 19 consolidated the allegation into an existing Complaint, following which the parties agreed to waive hearing on all issues and submit the cases directly to the Board for Decision.

Although the cases have been advanced to the Board pursuant to existing law, it is the General Counsel's view that the standard articulated by the panel majority in *Banner Estrella* is unworkable and fails to give appropriate weight to the shared employee and national interests furthered by the maintenance of confidentiality in the course of sensitive workplace investigations. Instead, by requiring a showing of particularized need and by projecting and elevating to a controlling status the comparatively slight and speculative Section 7 interests related to investigations concerning sensitive matters, *Banner Estrella* undermines collective employee interests and the national good.

In so saying, it should be understood that the General Counsel remains a strong advocate for individual employee rights, particularly as those rights relate to treatment of employees by employers and labor organizations. But, individual employee rights include the right to be free of employment discrimination, harassment on the job, workplace violence, unsafe working conditions, and invasions of privacy, among other evils. And while employees' Section 7 interests are undoubtedly served by protecting the collective right to share information about wages and benefits and discipline, it elevates form over substance to ignore employees' countervailing *collective* interest in efficient and effective workplace investigations into matters that vitally affect their day-to-day interests on the job. Indeed, on the narrow issue of confidentiality in workplace investigations, the Board seems to stand alone in its current, single-minded adherence to the notion that its expansive and questionable vision of rights under the NLRA should trump the countervailing federal and national interests reflected in the employment statutes administered by other agencies. The General Counsel believes and respectfully submits that it is possible to accommodate the important rights under our Act to those bestowed by federal statutes and laws of equal dignity and import, and that the collective interests of employees will be better served by doing so.

For these reasons, and those set forth hereinafter, the General Counsel respectfully urges the Board to find Respondent's rules lawful and hold that employers may maintain rules requiring employees to maintain the confidentiality of workplace investigations without violating Section 8(a)(1). The General Counsel urges the Board to overturn *Banner Estrella Medical Center*, inasmuch as its case-by-case approach is impractical and ignores employers' legitimate and substantial business interests in having a blanket confidentiality rule, as well as the benefit to employees of maintaining confidentiality in sensitive workplace investigations. Furthermore, *Banner Estrella* is inconsistent with the Board's recent decision in *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017), governing employer work rules, such that it would be appropriate for the Board to apply *Boeing* to confidentiality-in-workplace-investigations rules such as those here, rather than *Banner Estrella*, and to balance (i) the nature and extent of the potential impact on employee rights under the Act against (ii) employers' legitimate business interests. Because employers' interests in maintaining confidentiality in workplace investigations are substantial and such rules also benefit *employees,* while only potentially

affecting peripheral Section 7 rights, these rules should be considered *Boeing* Category 1 rules, and employers should be permitted to apply them to all workplace investigations without determining, on a case-by-case basis, whether confidentiality is needed in that particular investigation.

II. Statement of the Case

On September 22, 2017, the Regional Director for Region 19 issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing alleging that Respondent violated Section 8(a)(1) of the Act by maintaining certain rules in its employee handbook. On December 21, 2017, the Regional Director issued an Order Rescheduling Hearing to consider the ramifications of the Board's *Boeing* decision. On March 23, 2018, the Regional Director issued a further Order Postponing Hearing Indefinitely. On August 22, 2018, the General Counsel issued an Order Transferring Cases from Region 19 to Region 27. On August 30, 2018, the Regional Director for Region 27 issued an Amended Consolidated Complaint and Notice of Hearing. On October 18, 2018, the General Counsel and Respondent, with the consent of the Charging Party, submitted a joint motion to waive a hearing and submit the cases to the Board. On December 13, 2018, the Board granted that motion.

III. Statement of Facts and Provisions at Issue

Respondent operates a chain of retail stores that sell secondhand clothing and other items throughout the United States. At all material times, Respondent has maintained the following nationwide employee rules:

A. Report Illegal or Unethical Behavior

> Team members are expected to cooperate fully in investigations and answer any questions truthfully and to the best of their ability. Reporting persons and those who are interviewed are expected to maintain confidentiality regarding these investigations. Additionally, they are not to conduct investigations themselves unless [Respondent]'s investigators request assistance.

This rule is contained in Respondent's Code of Conduct, which prohibits a wide range of illegal and unethical activity such as unlawful discrimination and harassment, antitrust violations, workplace violence and disclosure of proprietary information.

B. Loss Prevention Policy

> …
> The following…are examples of behaviors that can have an adverse effect on the company and may lead to disciplinary action, up to and including termination:
> …Refusing to courteously cooperate in any company investigation. This includes, but is not limited to, unauthorized discussion of investigation or interview with other team members…

This rule is contained in Respondent's Loss Prevention Policy, which prohibits, *inter alia*, theft or destruction of Respondent property, possession or sale of illegal drugs or firearms, and acts of dishonesty, such as embezzlement.

Respondent has provided several business justifications for maintaining its confidentiality-in-workplace-investigations rules. As a retail industry employer, Respondent has an interest in preventing theft, and notes that its rules encourage employees to report theft by their coworkers without fear of retaliation. Respondent states that its employees often ask for confidentiality when reporting incidents of misconduct and, if allowed to provide assurances of confidentiality, Respondent could provide safe harbor to victims and witnesses, including physical safety and protection of reputation. Respondent notes that its employees have expressed reluctance to cooperate in workplace investigations out of fear of being labeled a "rat" or "snitch." Respondent also contends that it must be able to substantiate allegations of employee wrongdoing, including for incidents involving multiple employees, without employees being able to coach each other or coordinate their answers.

IV. Argument

For the reasons discussed below, the General Counsel is of the view that *Banner Estrella* was wrongly decided, impractical, and, in any event, superseded by the Board's *Boeing* decision. The General Counsel respectfully urges the Board to overturn *Banner Estrella* and find that employers' policies to ensure the confidentiality of workplace investigations, including

Respondent's confidentiality-in-workplace-investigations rules, are lawful Category 1 rules under the Board's new standard for evaluating workplace rules enunciated in *Boeing*.

A. *Banner Estrella* Failed to Weigh Important Employee Rights Protected by a Myriad of Other Statutes and Regulations.

A major failing of the Board's decision in *Banner Estrella* is that it largely ignored and, implicitly discounted, the countervailing collective employee interests that adhere in important non-NLRA statutory protections on the job, even as it concurrently gave improper weight to employees' "comparatively slight" Section 7 interests, when balanced against employers' substantial interests in ensuring the confidentiality of workplace investigations. *See Banner Estrella*, slip op. at 13-18 & 13 n.42 (citing *Great Dane Trailers*, 388 U.S. at 34). We deal with the latter concept in Section B of this Argument, but note here that whether a given rule may to some degree infringe on employees' ability to discuss working conditions should not be the only consideration before the Board. For although the right of employees to discuss working conditions is admittedly important to administration of the Act, an equally important and countervailing question should be whether a collective interest may also be furthered by the efficient and effective application of other statutes and regulations that exist to provide employees with protections in the workplace. Plainly, there is a role for confidentiality of investigations, as a mechanism to further the *employee* rights and interests that derive from such statutes and regulations, which should be recognized and accommodated by the Board, in the overall collective interests of employees and the national interest.

Thus, for example, there is little doubt that, in addition to furthering the proper investigation of employment discrimination claims, confidentiality-of-investigations rules also provide protection to those individuals or groups of employees who desire to speak out on collective working conditions, but are fearful. There are obvious collective and also Section 7 interests to be served here by encouraging and effectively allowing employees to report wrongdoing in the first place, which furthers the goals of the discrimination statutes while also furthering the employees' collective interests in the workplace. *See Human Resources Best Practices Guide*, https://www.staffone.com/hr-best-practices-guide/ (last visited Jan. 23, 2019)

(employee handbook can be a "vital tool in helping protect employees against inconsistent treatment and employers from discrimination or other legal claims"). For example, the EEOC advises employers to prevent workplace discrimination by adopting a strong anti-harassment policy that includes "[a]ssurance that the employer will protect the confidentiality of harassment complaints to the extent possible." *See Best Practices for Employers and Human Resources/EEO Professionals: How to Prevent Race and Color Discrimination*, https://www.eeoc.gov/eeoc/initiatives/e-race/bestpractices-employers.cfm (last visited Jan. 29, 2019).

Similarly, victims of sexual harassment are more likely to report abusive behavior if they are assured that their allegations will be investigated in a confidential manner. *See HR Magazine, How to Conduct a Workplace Investigation, Society for Human Resource Management,* https://www.shrm.org/hr-today/news/hr-magazine/Pages/1214-workplace-investigations.aspx (last visited Jan. 29, 2019) ("[e]ncourage all those involved in the investigation to keep the proceedings confidential to protect the integrity of the process. If word leaks out, other employees will lose trust and might refuse to share what they know"); Renee Manson, *Tips for Addressing and Investigating Sexual Harassment Allegations in the Workplace in Light of the #MeToo Movement*, Hiring to Firing Law Blog, Dec. 18, 2017, https://hiringtofiring.law/2017/12/18/tips-for-addressing-and-investigating-sexual-harassment-allegations-in-the-workplace-in-light-of-the-metoo-movement/ ("[f]ailure to treat a complaint with the appropriate level of confidentiality could result in employees being hesitant to report their issues and concerns in the future"). Indeed, the EEOC views a comprehensive anti-harassment policy that includes assurances that the identity of victims, alleged perpetrators, witnesses, and reporters of harassment, and the information obtained during such an investigation, will remain confidential, as helpful to prevent future workplace harassment. *See EEOC: Promising Practices for Preventing Harassment*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/eeoc/publications/promising-practices.cfm?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term (last visited Jan. 29, 2019). But, the Board's approach in *Banner Estrella* accomplishes the opposite of the collective interest: sexual harassment victims could not be assured confidentiality at the investigation's outset because an employer would first be required to

analyze if there was objective evidence to require confidentiality in that case, which it could only do after it learned the content of the allegation at issue. In such circumstances, one or more victims might well decide to forego reporting altogether.

Confidential investigations also assist in maintaining workplace safety—to the benefit of all employees—including by ensuring employees that they can confidentially report accidents, issues of employee fitness and dangerous weapons in the workplace, physical hazards, or dangerous behavior such as drug abuse, without fear of retaliation. *See Human Resources Best Practices Guide*, Staff One HR, https://www.staffone.com/hr-best-practices-guide/ (last visited Jan. 29, 2019) (for a thorough workplace accident investigation, employee interviews should be conducted "separately and confidentially"); Ashley Adams-Mott, *How to Report Drug Abuse in the Workplace*, Houston Chronicle, https://work.chron.com/report-drug-abuse-workplace-19828.html (last visited Jan 29, 2019) ("[y]our identity as a reporter [of an employee's suspected drug or alcohol use in the workplace] can be kept confidential"). Thus, witnesses to illegal or dangerous behavior are more likely to report the incident and/or heed an employer's requests to cooperate if they know their identities will be kept confidential and they will not be viewed as a workplace "snitch."

Indeed, all employees have strong interests in safe workplaces ensured by employer guarantees of confidential workplace investigations. Many employees fear retaliation if they report wrongdoing in the workplace and, if they are assured confidentiality, they are more likely to report dangerous or disruptive behavior. Assuaging employees' concerns in this regard is of particular importance in the era of "#MeToo"; employers are well-advised to prepare for more reports of sexual harassment and maintain confidentiality in those investigations to support victims and encourage them to report sexual misconduct in the workplace. *See, e.g.,* Manson, *Tips for Addressing and Investigating Sexual Harassment Allegations in the Workplace in Light of the #MeToo Movement*, https://hiringtofiring.law/2017/12/18/tips-for-addressing-and-investigating-sexual-harassment-allegations-in-the-workplace-in-light-of-the-metoo-movement/ (last visited Jan. 29, 2019) ("employers need to be ready for the impact of the MeToo movement and make sure that they have the appropriate policies and procedures in place to effectively address harassment complaints … [including by] ensur[ing] that the contents of the investigation

are kept as confidential as possible"); *#MeToo: Revisiting Policies in a Trending Workplace*, Ogletree Deakins Employment Law, https://ogletree.com/insights/2017-11-21/metoo-revisiting-policies-in-a-trending-workplace/ (last visited Jan. 29, 2019) ("now more than ever, employers will find it helpful to closely examine their harassment policies…. [and] may want to acknowledge the #MeToo movement[,] … [f]oster an environment where victims feel supported[, and] … keep investigations confidential"). Encouraging employee victims and witnesses to report misconduct by assuring them confidentiality permits employers to conduct thorough investigations, which thereby protects all employees, not just the complainants, by correcting the situation, including by suspending or terminating perpetrators of harassment and abuse. As a result, all employees have much to benefit from knowing that their employers can assure them confidentiality when reporting incidents of misconduct or other workplace dangers: they will be able to enjoy a safer, more supportive, and more productive workplace. *See id.* ("[h]arassment routinely results in low employee morale, less productivity, and low retention rates"); *The Cost of Sexual Harassment in the Workplace,* ERC, Dec. 11, 2017, https://www.yourerc.com/blog/post/the-cost-of-sexual-harassment-in-the-workplace (victims suffer from low morale and psychological damage).

Because it seems clear from the foregoing that the *Banner Estrella* formulation was too narrow in its focus, and failed to view confidentiality rules in light of the important, additional collective rights and interests adhering in other federal and state statutes and regulations bearing on employment conditions, the Board should overrule *Banner Estrella* and now recognize those interests in its decision here.

B. *Banner Estrella's* Requirement that Employers Determine a Need for Confidentiality on a Case-by-Case Basis in Each Workplace Investigation is Impractical and Improperly Ignores Employers' Legitimate and Substantial Need to Conduct Confidential Investigations in Order to Protect Employee Rights and Interests.

In *Banner Estrella*, the question before the Board concerned the legality of the employer's request that employees keep workplace investigatory interviews confidential. 362 NLRB No. 137, slip op. at 2. According to the employer, in certain "sensitive" investigations

such as those involving sexual harassment, employees had been asked to refrain from discussing the investigatory interview with coworkers, but the request did not prohibit employees from discussing their own complaints or workplace issues with coworkers even if those complaints or issues were the same ones being discussed in the investigatory interview. *Id.* at 10-12 (Member Miscimarra, dissenting in part). Despite the employer's claims that this effort at confidentiality was necessary in order to conduct a fair investigation and "separate facts from rumors," the Board majority found the employer had failed to establish a legitimate and substantial justification for requiring confidentiality because the employer had not first made an individualized determination that confidentiality was necessary in a particular interview. *Id.* at 4-5. Citing *Hyundai America Shipping Agency*, 357 NLRB 860, 875 (2011), the Board held that an *employer* must demonstrate its confidentiality needs in every case based on objectively reasonable grounds for believing that the integrity of the investigation will otherwise be compromised. 362 NLRB No. 137, slip op. at 3.

The Board's majority opinion drew sharp dissent from Member Miscimarra, who argued that the majority's test inappropriately shifted to employers the Board's responsibility to balance an employee's NLRA rights with an employer's asserted business justifications. *See Banner Estrella*, slip op. at 8 (Member Miscimarra, dissenting in part). Citing *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967), and *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 (1963), Member Miscimarra stated that the Board has the responsibility to determine whether actions that have the potential to interfere with NLRA-protected rights may nonetheless be justified in pursuit of legitimate business ends. *Banner Estrella*, slip op. at 13-14. Although the General Counsel agrees with former Member Miscimarra's conclusion, the dissent's analysis is too narrowly focused on the employer's business justification. Rather, even a balancing of the employees' rights and interests alone would establish that the rules in question are not unlawful, as we have discussed above.

But, rather than providing certainty regarding the types of investigations in which confidentiality would consistently be appropriate, the *Banner Estrella* majority's requirement that employers proceed case-by-case prevents responsible employers from developing internal guidelines, thereby diminishing consistency, predictability, and efficiency in investigations. The

majority also ignored the reality that employers often cannot establish objectively reasonable grounds for needing confidentiality because they do not know all the facts when embarking on an investigation. *See id*. at 20. Thus, the Board's test creates a "Hobson's Choice" for employers who must decide, at the very beginning of every workplace investigation, whether to conduct the investigation without taking reasonable steps to preserve its integrity—and thus reliability—or potentially face years of Board litigation. *See id.*; *see also* Stephen W. Lyman, *Confidential Workplace Investigations – a Dilemma for Employers*, HR Insights for Health Care, July 28, 2015, https://www.hallrender.com/2015/07/28/confidential-workplace-investigations-a-dilemma-for-employers/ ("[u]nfortunately, in [*Banner Estrella*], the NLRB offers no real guidance on exactly when the employer's 'justification' for requesting confidentiality will be sufficient to outweigh protected employee rights").

Specifically, employers must comply with federal anti-discrimination laws, OSHA, and state and local criminal statutes that have their own objectives and investigatory practices. Ensuring an investigation's confidentiality is considered the "proper" way to investigate complaints of workplace harassment; business law experts advise employers seeking to limit their legal exposure from harassment claims to "[i]nform the employee to keep the content of the interview confidential and to not discuss it among coworkers. The investigator should caution all employees being interviewed that … disclosing confidential information by discussing it with others can be cause for disciplinary action." *See* E. Jason Tremblay, *Properly Investigating Claims of Harassment: How to Limit a Company's Exposure*, American Bar Assoc. Business Law Section, Business Law Today, Vol. 18, No. 1 (Sept./Oct. 2008), https://apps.americanbar.org/buslaw/blt/2008-09-10/tremblay.shtml.[1] Employers should be

[1] Notably, federal agencies such as the EEOC and OSHA are required to keep interviews with employees confidential during their investigations of alleged wrongdoing. *See Confidentiality,* U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/employees/confidentiality.cfm. (last visited Jan. 29, 2019) ("[i]nformation obtained from individuals who contact EEOC is confidential" until formal charge is filed); *What are my rights during an inspection?*, U.S. Department of Labor, Occupational Safety and Health Administration, https://www.osha.gov/workers/index.html (last visited Jan. 29, 2019) ("[w]hen the OSHA inspector arrives, workers and their representatives have the right to talk privately with the OSHA inspector … [w]here there is no union or employee representative, the OSHA inspector must talk confidentially with a reasonable number of employees").

permitted to err on the side of caution in their attempts to comply with these statutes and should not have to choose between complying with the NLRA and other statutory schemes.

C. *Boeing's* Standard for Evaluating Workplace Rules Displaces *Banner Estrella.*

Two years after *Banner Estrella*, the Board in *Boeing* established a new standard for evaluating whether an employer's mere maintenance of a work rule violates Section 8(a)(1) of the Act. Rejecting *Lutheran Heritage*'s "reasonably construe" standard that improperly limited the Board's own discretion and failed to account for any legitimate justifications associated with workplace policies, the Board embraced its responsibility to balance employees' ability to exercise their Section 7 rights with an employer's right to maintain discipline and productivity in the workplace. 365 NLRB No. 154, slip op. at 2. Under the *Boeing* standard, the Board balances (i) the nature and extent of the potential impact on NLRA rights and (ii) legitimate justifications associated with the rule. *Id.* at 3. Applying the new standard, the Board found that the employer's justifications for a rule restricting camera-enabled devices on company property—which, among other things, assisted the company with its federally mandated duty to prevent unauthorized disclosure of information implicating national security—outweighed the rule's more limited adverse effect on the exercise of Section 7 rights. *Id.* at 5, 17-19.

In addition to properly balancing employee rights and employer business justifications, the *Boeing* test accommodates the Board's responsibility to harmonize the Act with other statutory schemes and to provide parties with sufficient certainty and clarity regarding their rights and obligations. Regarding the latter, the *Boeing* Board recognized that *employees* are disadvantaged when employers cannot implement and maintain predictable policies and rules that allow employees to know the standards of conduct to which they will be held. *Id.* at 2, 7, 10 (citations omitted).

Surveying the Board's inconsistent precedent governing workplace rules, the *Boeing* Board cited with approval *Caesar's Palace*, 336 NLRB 271, 272 (2001), in which it had upheld an employer's confidentiality rule prohibiting discussion of an ongoing investigation of alleged illegal drug activity in the workplace, after explicitly balancing employees' Section 7 rights

against the employer's business justifications. *See Boeing*, slip op. at 8. While the *Caesar's Palace* Board acknowledged that the employer's confidentiality rule to some extent limited employees' right to engage in protected discussions regarding discipline or disciplinary investigations involving fellow employees, the Board found that any adverse effect was explicitly outweighed by the employer's asserted legitimate and substantial business justifications, including guarding witnesses from retaliation and violence, protecting evidence, and maintaining accurate testimony. 336 NLRB at 272.

The standard described in *Banner Estrella*, which requires employers themselves to evaluate the need for confidentiality for each workplace investigation on a case-by-case basis, is at odds with the Board's responsibility to balance an employer's justification for a work rule against any potential effect on employees' Section 7 interests. *See Boeing,* slip op. at 7 (recognizing that the Supreme Court has repeatedly required the Board to weigh an employer's interests in a work restriction with the potential impact on NLRA-protected activities) (citations omitted). Further, by forcing employers to engage in a case-by-case analysis, the *Banner Estrella* approach provides little clarity regarding when confidentiality-in-workplace-investigations rules will survive the Board's review, deprives well-meaning employers of the opportunity to create rules that can be consistently applied to workplace investigations and, finally, ignores the fact that *employees* would benefit from predictable workplace policies rather than haphazard determinations in each workplace investigation. *See, e.g.,* Stephen W. Lyman, *Confidential Workplace Investigations – a Dilemma for Employers*, HR Insights for Health Care, July 28, 2015, https://www.hallrender.com/2015/07/28/confidential-workplace-investigations-a-dilemma-for-employers/. Indeed, there are fewer employees in need of clear guidance on confidentiality than those involved in workplace investigations. Thus, the Board should take this opportunity to acknowledge clearly the substantial employer interests in, and employee benefits from, confidential investigations and hold that confidentiality-in-workplace-investigations rules are lawful Category 1 rules under *Boeing*.[2]

[2] Of course, even if rules are facially lawful, the *Boeing* Board made clear that application of an otherwise lawful rule may still be unlawful. The Board explained that "even when a rule's *maintenance* is deemed lawful, the Board will examine the circumstances where the rule is *applied* to discipline employees who have engaged in NLRA-protected activity," and in such cases, the application of the rule may violate the Act. *Boeing,* slip op. at 5.

D. Applying *Boeing*, Employer Rules Requiring Confidentiality of Workplace Investigations Should Be Found Lawful.

Confidentiality-of-investigations rules should be found lawful because employers' legitimate and substantial business justifications for maintaining the rules outweigh the comparatively slight impact on employees' NLRA rights. Specifically, the General Counsel urges the Board to find that Respondent's rules, and confidentiality-of-workplace-investigation rules in general, are lawful because employers have strong interests in protecting the integrity of workplace investigations, complying with other federal and state laws that require confidential investigations, and maintaining workplaces free from harassment, abuse, and danger, which in turn benefit employees themselves, and these interests outweigh the minimal impact that these rules have on Section 7 rights.

While these kinds of rules impact an employee's ability to discuss the specifics of what was asked or answered in an investigation and therefore could potentially adversely affect employees' Section 7 right to discuss their own or other employees' discipline or disciplinary investigations, *see, e.g., Caesar's Palace*, 336 NLRB at 272, they do not preclude core Section 7 activity like union organizing or discussions amongst employees about essential workplace issues like wages, benefits, or disciplinary policies, or even the subject matter of an investigation.[3] Such rules also do not preclude discussions with an employee's union or the utilization of an employee's *Weingarten* rights. *See Banner Estrella*, slip op. at 8 (Member Miscimarra, dissenting in part) (confidentiality in investigations rule did not unreasonably interfere with Section 7 activity in part because employee not restricted from discussions with union representatives and no denial of *Weingarten* rights). Furthermore, the vast majority of workplace investigations involve allegations of illegal or unethical behavior that are clearly unprotected by Section 7. *See id.*, slip op. at 14-17 & 16 n.60. Indeed, Respondent's rules were primarily directed at investigations of employee theft, as well as a wide-range of illegal and unethical activity outlawed by Respondent's Code of Conduct, including unlawful discrimination and harassment, antitrust violations, possession or sale of illegal drugs or firearms, workplace

[3] To the extent an employer's rule reaches matters beyond a particular investigation, it could contain an unlawful limitation on employees' Section 7 rights.

violence, embezzlement and disclosure of proprietary information. None of these activities are protected by Section 7. In contrast to the comparatively slight impact that these rules may potentially have on Section 7, employees have a strong interest in safe work spaces—including work environments free from harassment and abuse, and protection from retaliation—that result from employees' ability to confidentially report workplace misconduct.

Employer interests in requiring confidentiality in workplace investigations alone clearly outweigh employees' peripheral Section 7 interest in disclosing matters they discussed or discovered in workplace investigations. Some of those interests are discussed at length above. In addition, Respondent's asserted business justifications for maintaining its confidentiality-in workplace-investigations rules reflect interests that are common to all employers. First, Respondent claims that its rules are necessary to substantiate allegations of misconduct, especially incidents involving multiple employees, without employees being coached or discussing ahead of time what they would say in the investigation. Requiring confidentiality provides some protection against suspects divulging what they learned in investigatory interviews, or from sharing their stories with coworkers to influence what others will say, especially at the beginning of an investigation. Further, Respondent states that its employees often ask for confidentiality and, by providing assurances of such, Respondent could provide safe harbor to victims of, and witnesses to, serious misconduct. Confidentiality is often cited as a best practice for exactly these types of concerns—to encourage victims to report allegations of sexual harassment or other illegal behavior and provide cover to witnesses who can substantiate such allegations. And, reducing workplace harassment also benefits businesses with increased productivity, fewer employee absences, and smaller turnover. *See The Cost of Sexual Harassment in the Workplace,* https://www.yourerc.com/blog/post/the-cost-of-sexual-harassment-in-the-workplace (last visited Jan. 29, 2019) ("sexual harassment makes it harder for everyone in the company to get their work done in ways big and small, and *that* (*not* legal bills) is what will likely cost the employer the most money in the long run") (emphasis in the original). Finally, Respondent contends that retail industry employers experience billions of dollars in theft each year, including from employees, and that its rules encourage employees to report theft by their coworkers without fear of being labeled a "rat" or "snitch." It is reasonable to expect that employees are more likely to report wrongdoing and cooperate in employer investigations when

employers can ensure confidentiality; indeed, Respondent notes that employees often ask for such assurances before reporting workplace misconduct. Protecting an investigation's confidentiality has long been recommended when investigating workplace theft. *See* Kevin Johnson, *How to Conduct a Workplace Investigation on Employee Theft*, Houston Chronical, https://smallbusiness.chron.com/conduct-workplace-investigation-employee-theft-16652.html (last visited Jan. 29, 2019) (establish confidentiality guidelines for employees and tell those interviewed that their responses will not be shared outside of the investigation; "[f]ear of retaliation can cause some employee witnesses to withhold information").

The Board should strike the balance in favor of the strong interests of all employers in maintaining confidentiality-in-investigations rules. In this regard, Respondent's asserted justifications for its confidentiality-in-workplace-investigations rules are legitimate, substantial, and compelling reasons for Respondent and all employers to lawfully prohibit employees from divulging information gathered in workplace investigations. Since all employers share Respondent's compelling reasons for maintaining rules requiring confidentiality in workplace investigations, the Board should designate these kinds of rules as *Boeing* Category 1 rules that do not require another case-specific analysis in order to determine their legality.

Striking the balance in favor of the legality of such rules also inures to the benefit of employees who will know, when deciding whether to report workplace misconduct and/or at the outset of any investigation, that they will be assured confidentiality and/or will be required to maintain confidentiality. As discussed above, confidential investigations benefit employees by encouraging employee victims and witnesses to report misconduct without fear of retaliation, thereby allowing employees to not only address wrongs done to them personally, but also to potentially remove those harms from the workplace to the benefit of all employees. *See Know Your Rights at Work: Sexual Harassment Employees' Guide: Sexually Harassed—What Should I do Next?*, American Association of University Women, https://www.aauw.org/what-we-do/legal-resources/know-your-rights-at-work/workplace-sexual-harassment/employees-guide/ (last visited Jan. 29, 2019) ("[t]he courageous act of reporting can change your employment culture and help to create more inclusive social norms at work"). The Board can only support this objective if it

rejects the case-by-case approach of *Banner Estrella* and permits employers to have a general policy of confidential workplace investigations that encourages employees to come forward.

V. Conclusion

Accordingly, weighing the legitimate, substantial, and compelling business justifications for confidentiality-of-investigations rules, and the benefits they accord employees, against the comparatively slight impact on Section 7 activity, these rules should be found to be lawful Category 1 rules so long as the rules confine themselves to information discussed or discovered in the investigation. The Board should overturn *Banner Estrella,* apply *Boeing,* and dismiss the Complaint allegations that the confidentiality-in-workplace-investigations rules unlawfully interfere with employees' Section 7 rights.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Brief of the General Counsel in Cases 27-CA-191574 and 27-CA-198058 was electronically filed via NLRB E-Filing System with the National Labor Relations Board and served in the manner indicated to the parties listed below on this 4th day of February, 2019.

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